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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 1143.

J. B. MICHAEL & CO., INC.,
Petitioner,
vs.
JEROME C. POWERS,
Respondent.

BRIEF

Of Respondent in Opposition to Petition for Writ of Certiorari.

THOMAS R. PREWITT,
Commerce Title Building,
Memphis, Tennessee,
Attorney for Respondent.

ARMSTRONG McCADDEN ALLEN BRADEN & GOODMAN,
Of Counsel.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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ALLEGED GROUNDS ON WHICH JURISDICTION OF THE COURT IS INVOKED.

There is no ground for invoking jurisdiction of this Court in this cause. The question presented for review in petition for certiorari was not raised in the United States Court of Appeals for the Sixth Circuit, which handed its opinion down on April 7, 1964 (App. A), notwithstanding the fact that the decision of the Tennessee Court of Appeals (with which the Federal decision is purportedly in conflict) was decided February 26, 1964 (App. B). Furthermore, the United States Court of Appeals decided no question of State law in conflict with applicable Tennessee decisions.

STATEMENT OF THE CASE.

In a tort case, resulting from an automobile accident that occurred in the State of Tennessee, respondent, Father Jerome C. Powers, recovered judgment, after jury verdict, in the United States District Court for the Western District of Tennessee, Western Division, against petitioner, J. B. Michael & Co., Inc. This judgment was affirmed on appeal by the Court of Appeals for the Sixth Circuit. Prior to action of the United States Court of Appeals, one Orlin Henson, in suit arising out of same accident, recovered judgment, after jury verdict, against both Powers and J. B. Michael & Co., Inc., in the Circuit Court of Shelby County, Tennessee; and this judgment was affirmed on appeal by the Tennessee Court of Appeals (App. A and B). Petitioner did not raise the question now presented, in the United States Court of Appeals, prior to date its opinion was filed; and neither did petitioner file any petition for rehearing in that Court, in the light of the Tennessee Court of Appeals decision. In the State Court proceedings, the rights and liabilities as between Powers and J. B. Michael & Co., Inc., were not put in issue by cross complaint or other adversary proceedings. Henson simply sued both parties and recovered a joint judgment (App. B).

ARGUMENT.

Petitioner failed to raise the question now presented in the United States Court of Appeals, notwithstanding the fact that the opinion of the Tennessee Court of Appeals, upon which reliance is now had, was decided over one month before the United States Court of Appeals handed down its decision. Since the question presented in this Court was not raised below, it would seem that this Court should not consider it on petition for certiorari.

Ellis v. Dixon, 75 S. Ct. 850, 349 U. S. 458, 99 L. Ed. 1231, rehearing denied, 350 U. S. 855.

However, had the question been presented to the United States Court of Appeals, that Court, under controlling Tennessee decisions, would have affirmed the District Court judgment. The very question now raised for the first time in this Court was decided by the Supreme Court of Tennessee in 1934 in the case of **Wiles v. Young, 167 Tenn. 224, 68 S. W. 2d 114.** In that case, arising out of an automobile accident, the plaintiff sued defendant for damages to his automobile. Prior to institution of that suit, a Miss Cooley, guest in the plaintiff's car, had recovered judgment against both parties for her personal injuries; and plaintiff had paid "his pro rata part" of the Cooley judgment. Defendant filed plea averring "the present suit was for damage suffered by plaintiff's car in the accident mentioned, and that the judgment in the suit of Miss Cooley against plaintiff and defendant was a judicial determination that plaintiff was guilty of negligence that proximately caused or contributed to the collision." The Trial Judge sustained the above plea and dismissed the suit, but the Supreme Court of Tennessee reversed, stating:

> "It is true both plaintiff and defendant were parties to the former suit and the judgment therein

was an adjudication that the plaintiff here was guilty of negligence. That is to say, plaintiff was adjudged to be guilty of negligence with respect to Miss Cooley—of a breach of duty toward Miss Cooley. It was not adjudged in the former suit, so far as this record shows, that plaintiff was guilty of any negligence with respect to defendant—of a breach of duty toward defendant.

The general rule is that parties to a judgment are not bound by it in subsequent controversies between each other, unless they were adversaries in the suit in which the judgment was rendered, 15 R. C. L. 1013; Freeman on Judgments (5th Ed.), § 424.

. . . . . .

So in the case before us the finding in the earlier case that plaintiff was guilty of negligence in respect to Miss Cooley is not a determination that he was guilty of negligence with respect to the defendant which, as a contributing cause, would bar this suit against defendant."

(68 S. W. 2d, at pp. 114, 115.)

The above holding of the Supreme Court of Tennessee, the court of last resort in that State, is still the law of Tennessee; and for that matter, it follows the great weight of authority throughout the country, as pointed out in annotation, **152 A. L. R. 1066**, as follows:

"One phase of the conclusiveness, inter se, of a judgment against codefendants in a negligence action is treated in an annotation in 101 A. L. R. 104, which is supplemented in 142 A. L. R. 727, entitled 'Judgment for plaintiff in action in tort or contract against codefendants, as conclusive in subsequent action between codefendants as to the liability of both or the liability of one and nonliability of the

other,' in which many cases are cited to the statement that 'while the cases are not entirely in harmony, sometimes even in the same jurisdiction, the rule supported by the great weight of authority is that a judgment in favor of the plaintiff in an action against two or more defendants is not res adjudicata or conclusive of the rights and liabilities of the defendants inter se in a subsequent action between them, unless those rights and liabilities were expressly put in issue in the first action, by cross complaint or other adversary pleadings, and determined by the judgment in the first action.'"

The writ should be denied for yet another reason. The jury verdict in favor of respondent Powers in the United States District Court was handed down prior to verdict and judgment in the State Court action, not subsequent thereto. Thus, all other questions aside, the Federal Court judgment on a jury verdict certainly could not be affected by a subsequent jury verdict in a State Court proceeding.

For the reasons stated, the petition for writ of certiorari has no conceivable basis and should be denied.

Respectfully submitted.

THOMAS R. PREWITT,
Attorney for Respondent,
Jérome C. Powers.

ARMSTRONG McCADDEN ALLEN BRADEN & GOODMAN,
Of Counsel.